QUARTERLY REPORT

October - December 1998

The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676 or contact him by e-mail at <kmcdowel@doe.state.in.us>.

In this report:

EMERGENCY PREPAREDNESS AND CRISIS INTERVENTION

Although reports of school violence dominate the media and are exotic topics for public consumption, the vast majority of public and private schools are safe places and are operating effectively. This is not to say that school violence is not a problem. Society as a whole is experiencing increased incidences of violence. Publicly funded schools, as one of the remaining community gathering points, are certain to witness the increase in violence and other forms of incivility, intimidation, disrespect, and hate.[1]

- Violence took the lives of 2,428 children in 1992, an increase of 67 percent in six years.

- Nearly three (3) million crimes occur in or near schools every year—16,000 each day, one every six (6) seconds. The Center to Prevent Handgun Violence found that 32 percent of school violence occurs between classes, 22 percent during class, and 16 percent after school.

- According to the U.S. Centers for Disease Control and Prevention (1992), in 1990, nearly 20 percent of students in grades 9-12 reported they had carried a weapon at least once during the 30 days preceding the survey. The figure varied by gender, race, and ethnicity. Male students (32 percent) were more likely than female students (8 percent) to have carried a weapon to school. White male students (29 percent) were less likely to have carried a weapon than Black (39 percent) or Hispanic (41 percent) male students. White female students (5 percent) were less likely to have carried a weapon to school than Black (17 percent) or Hispanic (12 percent) female students.

The United States Department of Justice's report *Juvenile Offend[1]ers and Victims: 1996 Update on Violence* contained the following:

- Each school day, about 150,000 students stay home because they fear for their safety.

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[1]There is also a disturbing trend of presenting violence as an entertainment medium, which tends to legitimize such behavior. The popularity of such television shows as "COPS," "Real TV," "World's Scariest Chase Scenes," "When Pets Go Bad," and so on have long served as indicators of devolution. However, the recent brouhaha created by the airing by "Sixty Minutes" of an assisted suicide or homicide would seem to indicate a wider acceptance of the cheapening of life than previously understood. This, alone, poses significant problems for schools in addressing the increased incivility and the acceptance of violence as a means of expression.

- Nearly 100,000 teenagers take weapons (guns, knives, clubs) to school everyday.
- About 3,700 students are assaulted daily.
- Everyday, approximately 1,000 unwed teens become mothers.
- Everyday, approximately 2,500 teenagers drop out of school.
- Fourteen (14) percent of all assaults and eight (8) percent of all rapes reported in the United States occur on school property.
- The number of juveniles murdered increased by 82 percent from 1984 to 1994.
- The number of juvenile murderers tripled between 1984 and 1994.[2]

Although the statistics are daunting, the concept of "Safe Schools" encompasses more than acts of violence. "Safe Schools" also include preparedness for natural occurrences as well as anticipation of man-made crises. This is easier said than done.

The Indiana State Board of Education (ISBOE), under a former rule, required, as a part of the Performance-Based Accreditation (PBA) process, that public schools and schools seeking accreditation provide rather generally for "disaster plans," including warning systems, the posting of evacuation routes, and procedures for responding to adverse weather conditions, fires, earthquakes, and nuclear disasters. The ISBOE promulgated a new rule, 511 IAC 6.1-2-2.5, that addresses emergency preparedness more extensively. While this rule contains many of the former provisions, it is considerably more detailed. In addition to the "appropriate warning systems" and "posting of evacuation routes," each school corporation is to consult with local public safety agencies and develop a written emergency preparedness plan for each school in the school corporation that includes, at a minimum, the following:

- Procedures for notifying other agencies and organizations.
- Emergency preparedness instruction for staff and students.
- Public information procedures.
- Steps that will be taken prior to a decision to evacuate buildings or dismiss classes.
- Provisions to protect the safety and well-being of staff, students, and the public in case of:
    - fire;
    - natural disaster, such as tornado, flood, or earthquake;

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[2]The report was recently cited in *Federal, State, and Local Responses to Public School Violence*, Robert C. Cloud, Ed.D., 120 Ed.Law.Rep. 877 (Nov. 13, 1997).

- adverse weather conditions, including extreme heat;
- nuclear contamination, such as power plant or transport vehicle spills;
- exposure to chemicals, such as pesticides, industrial spills and contaminants, laboratory chemicals, and cleaning agents (see, for example, I.C. 20-8.1-8-1);
- manmade occurrences, such as student disturbance, weapon, weapon of mass destruction, contamination of water supply or air supply, hostage, and kidnaping incidents.

The superintendent or the superintendent's counterpart in an accredited private school is to certify to the Indiana Department of Education, within sixty (60) days after the beginning date of each school year, that the district's emergency preparedness plans for the district and each of the district's schools have been reviewed and revised, if necessary. This certification is also necessary within sixty (60) days of the opening of a new or significantly remodeled school.

Accreditation of schools is a function of the ISBOE. A portion of the accreditation or PBA process includes a determination whether a school has complied with certain "legal standards," as these are defined at I.C. 20-1-1.2-1. One of the "legal standards" involves "health and safety requirements." I.C. 20-1-1.2-7(a)(2)(A). See also I.C. 20-1-1.2-8(a)(1). A school cannot be accredited through PBA without complying with legal standards. A school could also lose its accreditation status should it fail to comply substantially with the legal standards or the school has failed to meet expected performance levels for two (2) consecutive years. This could occur even though the school is not up for review under the established cyclical system. See 511 IAC 6.1-1-11.5.[3] This latter rule came into effect in October 1997.

[3]There are consequences for failure to comply with legal standards. A recent well written article addressing the ISBOE's new rule, written by an attorney who represents both private and public schools, contained the following: "No provision is made in the new rule regarding consequences for not making an appropriate certification [of the emergency preparedness plan] to the department of education." The ISBOE's new rule is not to be read in isolation. The rule is an integral part of the PBA process. The consequences would be the denial of accreditation status, the downgrading of accreditation status (from full accreditation status through certain gradations to probationary status), or the withdrawal of accreditation status. In addition, a public school that is placed on probationary status could experience transfer tuition repercussions. Effective October 1, 1997, a student could transfer from a school that is not fully accredited by the ISBOE if the student's request for transfer is related to the probationary accreditation status of the school. See 511 IAC 1-6-3(4).

The ISBOE and the Indiana Department of Education (IDOE) have relied heavily upon the Indiana Safe Schools Leadership Consortium in addressing this legal standard. The Consortium is a broad-based group of constituents composed of local school district officials, including experienced safety officers; state and local emergency response agencies; and state agency personnel. At this writing, a series of workshops have been and are being conducted throughout Indiana as a means of assisting schools and school districts in the development and implementation of Emergency Preparedness Plans and Crisis Intervention Plans.[4] The Lead Trainers are all experienced in school safety and local agency cooperative measures.

With the increased state and national emphasis on school safety and crisis intervention, articles on these topics will appear more frequently in the **Quarterly Report**. This edition will address two aspects of evacuation procedures, one involving the entire school during an actual emergency and the other the more individualized planning for students with mobility concerns.

Evacuation Procedures: The St. Matthew's Experience

St. Matthew Catholic School is an accredited parochial school located on the northeast side of Indianapolis. It has a student population of 536 from preschool through 8th grade, with a staff of about 30 adults. The school is attached to the parish church. The school office and the parish office are near each other. On Monday, November 9, 1998, a letter postmarked in Texas but with no return address arrived in the parish office. The letter was opened. Inside was a note reading, "You have been exposed to anthrax."[5] The school and the church had to be evacuated. Although the threat turned out to be a hoax, the evacuation experience tested the emergency preparedness plan of the school and demonstrated the need for efficient response plans by various public and private entities.

According to the principal at St. Matthew, Rita Parsons, the school began developing a more detailed plan to address emergencies and crises nearly five years ago following a suicide threat. The St. Vincent Stress Center in Indianapolis encouraged the school to develop a school crisis team. A team from St. Matthew attended workshops and established tentative cooperative plans with other nearby schools should a crisis occur. An increasing number of parochial schools no longer maintain school buses but rely upon car pools for transporting students. St. Matthew had planned to use school buses from another nearby parochial school should a school evacuation be necessary. Of primary importance, Parsons said, is to ensure the adults carry out their functions in a calm and mature way. "Staff have to be trained how to react. Kids can read adults. If you panic, if you show fear, the kids will too."

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[4]Crisis Intervention Plans are proposed as a part of the rules for the Office of Student Services.

[5]Anthrax is an infectious disease caused by a germ found in plant-eating animals. The illness can cause the lungs to swell with fluid and make breathing difficult. If not treated with antibiotics, anthrax can be fatal. It is considered a "weapon of mass destruction."

St. Matthew personnel had continuing staff development, such as role playing and brain storming, and were equipped with a communication system (eight walkie-talkies). However, on November 9, 1998, there were nine (9) substitute teachers in the building for teachers attending an in-service. Once the anthrax threat was presented, the school initiated its "lock-down" procedures.[6] As a part of the lock-down procedure, teachers merely lock the doors and continue with their lessons. The lock-down continued for one-half an hour while the Indianapolis-Marion County Emergency Management Agency and the Washington Township Fire Department responded.[7] The students were safely evacuated to the back parking lot and walked to the nearby fire station. From there, three Indianapolis Metro buses transferred the students to nearby Cathedral High School, with police escort, where parents later retrieved the students.

Parsons stayed in the school to answer parent calls for as long as the emergency management team would permit her. It was important to get a message to parents through the media where parents could pick up their children. Once the media disseminated the message, the telephones at St. Matthew "locked up," according to Parsons.

Although the students were use to practicing evacuation procedures because of fire and tornado drills, "They knew this was pretty serious." This became a concern for the principal and staff: Who should be evacuated to Cathedral High School first? The decision was to evacuate the middle school students first. "The middle school kids knew what anthrax was. Because they knew too much, they would scare the younger kids." While the middle school students were moved to Cathedral on the first three buses, the music teacher engaged the remaining students in

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[6]"The lock-down procedures are:

1. A lock-down will occur when the administrator determines [an unauthorized] visitor is in the building, bomb threat, possible evacuation, crime committed in the area, etc.

2. The administrator will make the announcement, "Mr. [name omitted], if you are in the building, please come to the office." This tells the staff to close and lock their doors until further notice. Any staff that is free from children at the time of a lockdown, check with the office to see where you're needed.

3. If we must evacuate, walkie-talkies are given to assigned staff. They will instruct staff of any communication given from administration or emergency teams. All homeroom teachers will pick up their classes from special area teachers in the case of an evacuation.

4. It is important that all adults remain calm. The students will read your emotions immediately. They will react to your behaviors.

5. Follow all directives from emergency personnel. Please keep students calm. The support staff and special area teachers are there to assist if needed. Contact a staff member with a walkie-talkie for assistance."

[7]The response time was critical. The fire department was there in three minutes while emergency management was there in 15 minutes. St. Matthew supplies the fire department, on an annual basis, a floor plan of its physical plant.

songs and games. Following evacuation of the middle school students, the younger ones were moved. Parsons added, "You always hear that in an emergency, the first thing you should grab is the grade book. The first thing you *should* grab is the student directory." The directory has the pertinent family information on each student, including class assignments, the names of parents or guardians, addresses, and telephone numbers. With the student directory and the emergency cards, St. Matthew staff were able to determine that no students had been left in the building or at the fire station. Each student was checked off at Cathedral as parents retrieved their children. However, no student was released to his parent until all students were accounted for. The principal was on the last bus to the high school. The entire process, from the initial threat to the lock-down to the evacuation to the fire station to the removal to the nearby high school to the parents retrieving their children lasted from 1:30 p.m. to 4:55 p.m. Every student was accounted for at each step.

Although emergency management indicated that night around 11:00 p.m. the school could reopen the next day, it was decided it would be better to remain closed on Tuesday, November 10. This provided staff time to prepare for the aftermath. When school resumed on Wednesday, November 11, teachers were in the gymnasium to greet students. The teachers were smiling and reassuring. Counselors were also present to talk to any students with residual fears. The Roman Catholic Archdiocese of Indianapolis also issued a media advisory on Tuesday, advising that the school would reopen the following day (November 11) but establishing some reasonable limitations. The media advisory stated, in pertinent part:

> Students will arrive at school tomorrow around 7:30 a.m. and be directed to the gymnasium to be greeted by their teachers and support staff. After reporting to their classroom, students will attend the regular weekly liturgy at 8:30 a.m. in the church. Media are welcome to videotape students returning to school and attending Mass. The principal, Rita Parsons, and Annette "Mickey" Lentz, head of Catholic education for the archdiocese, will be available to briefly meet with reporters as a group immediately after Mass at approximately 9:15 a.m. As a measure to return school to normal, media are asked not to enter the gymnasium when students are welcomed back or the school building during school hours.

Media were advised not to approach a student entering school alone. Should the student be accompanied by an adult, they could be approached. Thursday was as typical a day as possible, but on Friday, courtesy of 1,500 pizzas donated by a local pizza chain and soft drinks provided by a distributor, the school had a party—and invited the firemen, who came. It was, as Parsons related, a "non-uniform day. Everyone sat on the floor. It was a celebration of sorts. There was more pizza than I can remember. We wrapped it up. We resolved the matter. And we moved on."

Parsons stressed the importance of planning and preparing. "Everything kicks in. Planning makes you pro-active. People have to be trained how to act. For example, when there are fire drills, you just go outside and stand in the parking lot. In reality, you wouldn't do that. You

have to know where you're going to go." She reiterated that staff preparation and performance are keys to safe and successful evacuation or attention to crises. St. Matthew staff were able to address those elements within their immediate responsibility, such as the lock-down and the use of the student directory and emergency cards to account for all students and ensure they left with the proper people. However, the use of the fire station as a "safe haven," the use of Indianapolis Metro buses with police escorts, and the use of Cathedral High School as the evacuation end point were not a part of the St. Matthew evacuation plan. The local emergency management agency coordinated the process with the Indianapolis police, the Metro bus service, and the high school. The school's emergency preparedness plan will, according to Parsons, include the fire station as a "safe haven" point in the future.

According to Parsons, the Metropolitan School District of Perry Township on the Indianapolis southside has shared its school safety resource guides with the nonpublic schools in its area. The public school district has also made available the use of its school buses in the event an evacuation of students from a nonpublic school is necessary.

Evacuation Procedures: Students with Disabilities

Evacuation of buildings during natural or manmade situations will require more than evacuation routes. There are oftentimes special considerations that should be attended to prior to any instance where evacuation becomes necessary because of an actual emergency. These special circumstances will involve, for example, students and staff who are either wheelchair users or who have limited ambulatory functions. The following are applications of this requirement, both under current Indiana law and under federal laws.

Complaint No. 1195.97. Each Indiana public school corporation is required to include in its disaster plan provisions for warning and evacuating students whose disabilities require special warning or evacuation procedures. 511 IAC 7-6-4(d). In this situation, the student was six years old but, due to an orthopedic impairment, he required the use of a wheelchair. The classroom where the student was located had an exit to the outside, but there was a step, rendering the exit inaccessible. Although the emergency exit at the main entrance of the school was accessible for wheelchair users, this was some distance from the student's classroom. The school had no plan in place or assigned personnel to ensure safe evacuation of the student should an emergency arise. In addition, the school did not include a means for warning and evacuating students in its Emergency Preparedness Plan it submitted to the Indiana Department of Education. Corrective action required the school district to amend its Emergency Preparedness Plan to address evacuation procedures generally and to reconvene the student's case conference committee to discuss his situation individually.[8]

Bay County (FL) School District, 29 IDELR 243 (OCR 1998). The Office for Civil Rights of

[8]Complaint investigations of this sort are required by the Individuals with Disabilities Education Act (IDEA) at 34 CFR §§300.660-300.662. The ISBOE's regulation implementing this requirement is found at 511 IAC 7-15-4. Complaint investigations are conducted through the IDOE's Division of Special Education.

the U.S. Department of Education (OCR) determined that the school district did not violate Sec. 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act (A.D.A.) with respect to a middle school student with a mobility impairment. The student's most recent IEP team meeting assigned a 1:1 paraprofessional who assisted the student during transportation and on campus, including assisting with the opening of doors. The school did have a student-specific evacuation plan for the student, and had emergency evacuation plans for all affected students with disabilities in the middle school.

Department of Elementary and Secondary Education (MO), 18 IDELR 355 (OCR 1991). OCR found that the state school for students with severe disabilities violated Sec. 504. Forty percent of the students used wheelchairs, but six of the nine exits from the ground floor had drop-offs significant enough to prevent the students from exiting safely unassisted. Most exits lack ramps altogether. The school's evacuation plan was inadequate, rendering the school's programs inaccessible to the students with disabilities.[9]

Pittsburgh Public Schools (PA), EHLR 352:634 (OCR 1988). Complainant alleged the school did not have evacuation procedures for students with disabilities that were equally effective compared to procedures for students without disabilities. The school was a three-story building with a split-level edifice on uneven ground. The first two floors have exits and entrances at ground level with no steps. The third floor has to be exited by a flight of stairs. The Office for Civil Rights (OCR) determined the school's procedures did not violate Sec. 504. The principal's office has a schedule showing where each student with disabilities is located at all times. For fire drills, there is a teacher or aide assigned to go to each student's location. There are back-ups for the teachers and aides assigned the initial responsibility. Many special education classes are located on floors which exit without stairs. OCR noted that the school had personnel assigned various responsibilities with sufficient back-up. OCR also noted that the school had also satisfied local fire code requirements for evacuation plans.

Seattle (WA) School District No. 1, EHLR 352:487 (OCR 1987). The school developed an evacuation plan for mobility-impaired students who were non-ambulatory. Special education personnel and the fire department were consulted in the development of the plan. Teachers are suppose to assign instructional aides to assist the students during evacuations. Students on the second floor are suppose to meet at the northwest corner of the second floor, where three evacuation chairs are stored. To reach this spot, the students would have to travel against the flow of other students exiting the building. Each evacuation chair requires two adults. Four aides were assigned this responsibility, but there were no back-ups. The aides were not always in

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[9]The Individuals with Disabilities Education Law Report (IDELR)—as well as its predecessor, the Education of the Handicapped Law Report (EHLR)—is a reporter service published by LRP Publications of Horsham, PA. "OCR" refers to the Office for Civil Rights, the agency within the U.S. Department of Education responsible for ensuring compliance with various non-discrimination laws by recipients of federal financial assistance for educational programs.

the building at the same time. Additionally, the aides—who all worked on the first floor—had a primary responsibility for evacuating the first floor before assisting the non-ambulatory students on the second floor (between 2 and 5 students during any given class period). During fire evacuation drills, the non-ambulatory students on the second floor were never evacuated. There was an actual fire in February 1987. The non-ambulatory students were not evacuated. The evacuation plan violated Sec. 504. There were inadequate evacuation chairs and insufficient personnel assigned. The school agreed to provide sufficient evacuation (sedan) chairs and assigned two school personnel per student with alternates. The school also ensured personnel assigned would have a primary responsibility of evacuating the mobility-impaired students.

Marion County (WV) Public Schools, EHLR 352:112 (OCR 1985). Although the school did not have a visual fire alarm/warning system for students with hearing impairments (HI), OCR found that the school's alternative plan did not violate Sec. 504. The alternative plan (which was an interim plan while a visual alarm was being installed) called for a "buddy" system, where a student without disabilities was assigned to an HI student in each class. Each class had a back-up "buddy." The "buddy" would ensure the HI student would safely exit the school during evacuation procedures.

Ossining (NY) Union Free School District, EHLR 257:124 (OCR 1980). The school's programs were inaccessible to students with disabilities in several respects, including lack of visual as well as auditory fire alarm systems in any of its schools.

Policy Interpretation No. 4, EHLR 251:02 (OCR 1978). Carrying a student with disabilities is an unacceptable method for achieving program accessibility except in two cases. First, when program accessibility can be achieved only through structural changes, carrying may serve as an expedient means of achieving accessibility until construction is completed. Second, carrying will be permitted in manifestly exceptional cases if carriers are formally instructed on the safest and least humiliating means of carrying and the service is provided in a reliable manner.

CHARTER SCHOOLS: PRACTICAL AND LEGAL CONCERNS

The Wisconsin Supreme Court, in its June 10, 1998, decision, upheld the 1995 expansion of the Milwaukee Parental Choice Program (MPCP) to include sectarian private schools in the pool of qualifying schools which low-income families in the Milwaukee Public Schools could attend through a voucher program that made state aid payable to the parent or guardian rather than the private school itself. This decision increased appreciably the level of interest in charter schools and vouchers in Indiana. Wisconsin's constitutional provisions regarding church-state relationships are nearly identical to Indiana's constitution. See "Vouchers and Parochial Schools," **Quarterly Report** April-June 1998. The U.S. Supreme Court has declined to review the decision. Jackson v. Benson, 578 N.W.2d 602 (Wisc. 1998), *cert. den.,* 119 S.Ct. 466 (1998). The high court's decision not to review the Wisconsin decision has engendered a number of conflicting legal analyses. See, for example, "'Green Light' for School Vouchers?:

High Court Lets Stand Ruling on Choice," *Education Week* (December 18, 1998), and "High Court Ignores Wisconsin Voucher Appeal," *School Law News* (November 13, 1998). Actually, the Supreme Court did not provide any reasons for declining to review the decision.

Although there have been versions of "charter school" bills introduced in past sessions of the Indiana General Assembly, there is likely to be heightened interest in the concept this year due to the MPCP decision. Four (4) bills have been introduced in the 1999 General Assembly, three in the House and one in the Senate. The bills have some commonalities, but, for the most part, each one reflects particularized philosophies regarding governance, licensure, selection of personnel, state oversight, and degree of autonomy.[10]

It is expected all four versions are likely to experience some criticism. Of the bills themselves, three of them limit charter schools to specific geographic locations, all four prohibit the use of a charter to operate a sectarian school or a home school, and two prohibit the creation of a "virtual school." (See the discussion regarding the Noah Webster Academy in Michigan, *infra*.) All four contemplate some relationship with the local governing body and not directly with the state. All four contemplate some type of state appeal process, either involving the State Board of Education or the State Superintendent of Public Instruction, with the Indiana Department of Education largely relegated to collecting data and preparing an annual report for the legislature. All four prohibit discrimination, while three specifically prohibit denial of services to students with disabilities. All four contemplate waivers of certain state requirements, involving curriculum and textbook adoption. But the bills vary widely with respect to the function of existing collective bargaining units, the use of fully licensed teachers and administrators, the degree of contractual involvement with third parties or other outside contractors, relative seniority rights and personnel allocations, and the adjudicative role of the state agencies.

While the philosophical differences among the bills may ultimately prevent any effective charter school legislation this year in Indiana, there will always be legal concerns involved with such initiatives. These legal concerns will be present any year and with respect to any proposed legislation. With increasing federal attention and judicial constructions from other jurisdictions, a more distinct picture is emerging regarding basic legal standards. The following cases and

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[10]Although the definition of what constitutes a "charter school" can be variable, generally "charter school" legislation permits a large or unlimited number of schools to "reform," permits a variety of sponsors beyond the local governing body, permits existing schools to convert and new schools to start, provides automatic blanket exemptions from state and local regulations, gives complete control over money allocated, allows total control over personnel matters, and gives the school complete autonomy. *Charter Schools: What are they up to? A 1995 Survey*, Education Commission of the States (A. Medler and J. Nathan), cited in *Charter Schools' Legal Responsibilities Toward Children with Disabilities*, 126 *Ed. Law. Rep.* 565 (J. McKinney, 1998). In *Update on the Status of Charter School Initiatives in the United States*, "charter school" is defined as "an autonomous, results-oriented, publicly-funded school of choice that is designed and run by teachers or other operators under contract with a public sponsor." (T. Spradlin, 1997).

Office for Civil Rights (OCR) findings are representative.

Students With Disabilities: Educational Services

When Congress reauthorized the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.* (1997), it included a specific reference to charter schools that local school districts must meet as a condition for receipt of federal funds:

> TREATMENT OF CHARTER SCHOOLS AND THEIR STUDENTS.—
> In carrying out this part with respect to charter schools that are public schools of the local educational agency, the local educational agency—
> (A) serves children with disabilities attending those schools in the same manner as it serves children with disabilities in its other schools; and
> (B) provides funds under this part to those schools in the same manner as it provides those funds to its other schools.

20 U.S.C. §1413(a)(5). Also see 20 U.S.C. §1413(e)(1)(B) regarding the joint establishment of eligibility for funding by charter schools. In the wake of the Wisconsin Supreme Court's decision in Jackson v. Benson, *supra*, three charter schools participating in the Milwaukee program but chartered by the City of Milwaukee's Common Council became embroiled in a dispute with the Wisconsin Department of Public Instruction (WDPI) over the application of IDEA to their operations. The schools acknowledged their responsibility to accept students with disabilities, but did not believe they had to offer the students all the services required by the federal law. They maintained they are neither a private school nor a public school but a "new breed" of school created by the legislature. They maintained they did not have any responsibility for evaluating a student to determine eligibility for IDEA services, developing an individualized education program (IEP) for an eligible student, including a student with disabilties in the general education population where appropriate, or providing such a student with properly licensed teachers. WDPI noted the charter schools were financed with public money and, as such, are required to abide by IDEA's requirements to provide eligible students with a free appropriate public education (FAPE) in the least restrictive environment (LRE) pursuant to an IEP. Parents are entitled to the full procedural safeguards afforded under IDEA.

The United States Department of Education (USDOE) was asked by all parties to render an opinion. By letter dated October 8, 1998, Acting Deputy Secretary Marshall S. Smith noted that, for IDEA purposes, a school is either public or private and not in between. The schools chartered by the City of Milwaukee through its Common Council are public schools. In reaching this determination, USDOE noted the charter schools "do not charge tuition to any of their students, receive their basic support through public funds, are exempt from many or all State laws and regulations applicable to traditional public schools, are established under a State charter school law, are chartered by a public authority, are required to meet public standards of educational and fiscal accountability, and are subject to termination by a public authority for failing to meet those

standards."[11] Wisconsin, as other states with charter schools, had also assured the USDOE as a condition for receipt of federal funds under the ESEA that its charter schools are "public schools" that, among other things, comply with IDEA.[12]

The USDOE also rejected the Common Council's interpretation of a "local educational agency" or LEA. The Common Council claimed the Milwaukee Public Schools is the LEA responsible for compliance with IDEA. "Neither the City nor the State may use the LEA concept to avoid obligations under federal law. For purposes of the IDEA, those obligations—and specifically the obligation to provide FAPE to children with disabilities—turn on whether the charter schools are public or private schools, as discussed above. 20 U.S.C. §1412(a)(10). If those schools are public, and we believe that they are, then there is considerable flexibility in the State to designate an LEA under the alternative definitions of LEA in the IDEA. 20 U.S.C. §1402(15). However, that LEA must have the authority to ensure full compliance with the IDEA for children with disabilities attending charter schools for which the LEA is responsible." USDOE noted that the Milwaukee Public Schools is "unable to exercise sufficient control over the charter schools to ensure compliance," and, hence, cannot be the LEA for students with disabilities attending the City-chartered schools. Because the concept of "LEA" is a somewhat flexible concept that can be accomplished in a number of ways, including the use of interagency agreements, educational service agencies, and "other strategies that pool resources," the USDOE leaves to the States the determinations as to whether or not an entity will be an "LEA." However, "[i]f the State does not designate a responsible LEA, the [USDOE] would look to the State for ensuring that FAPE is made available [to eligible students with disabilities]."

USDOE also noted that failure of a State to comply with IDEA can result in the full or complete withholding of federal funds, which, for Wisconsin, would be just over $80 million a year. In addition, "[n]oncompliance with Section 504 [of the Rehabilitation Act of 1973] could place at risk all federal financial assistance from the [USDOE]..."

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[11]The USDOE was applying pertinent elements of the "charter school" definition found at 20 U.S.C. §8066(a)(1)(A)-(K) of the Elementary and Secondary Education Act (ESEA).

[12]USDOE distinguished publicly funded charter schools from the "choice" program under the MPCP, which specifically allowed parents to chose "private schools." This will be addressed below.

Students with Disabilities: Discrimination

Although the USDOE was asked primarily to address IDEA questions with respect to the Wisconsin charter school dispute in Milwaukee, it did address non-compliance with Section 504, which, along with the Americans with Disabilities Act (A.D.A.), prohibits discrimination on the basis of disability. Sec. 504 and the A.D.A. are not detailed education-related laws as such. There is no list of disabilities, as in IDEA, nor are there detailed, minimum procedures. Also, because of the general yet inclusive nature of the laws, a number of students with disabilities who do not require special education under IDEA are also covered. Because a "charter school" is by federal definition a "public school," it is highly likely such schools would come under the scrutiny of the Office for Civil Rights (OCR) where there are allegations of discrimination. The following is a report involving such allegations.

The Horace Mann Foundation and the Edison Project, through an approved charter with the Commonwealth of Massachusetts, opened a K-6 school known as the "Boston Renaissance Charter School" with a mission to provide "urban youth with the fully rounded education they will need to take their place in the economic and political life of their city and their country." Admission is by lottery. The charter school is open 12 hours a day, seven to eight hours devoted to academics with the remainder of the time devoted to a variety of before-school and after-school activities. The school year is 206 instructional days, 26 days longer than the state minimum. In Boston (MA) Renaissance Charter School, 3 ECLPR ¶95 (OCR 1997), the Office for Civil Rights found the charter school in violation of Sec. 504 and Title II, A.D.A. for its failure to notify parents of Sec. 504 procedural safeguards, for failure to have the required notice of nondiscrimination, and for failure to have a designated Sec. 504 coordinator. OCR also found the charter school discriminated against a student on the basis of his disability. The student, who had previously been in a Head Start program, began as a kindergarten student in the charter school. The student experienced behavioral problems almost immediately. He was physically restrained by his teacher, the classroom aide, or other employees of the charter school. Often, the parents were called at their places of employment and requested to remove the student from school for the remainder of the school day and, occasionally, for the following day or days. The school proposed the student be evaluated for special education, but the parents declined. The parents were not informed of Sec. 504 nor were the parents consulted regarding several behavioral modifications that were employed with the student. The situation was exacerbated by numerous turnovers in teaching personnel, many of whom were inexperienced in addressing behavioral problems. In December, the charter school informed the parents the student's instructional day would end at noontime and the parents were responsible for removing him at that time. The student's behavior did not improve. He was often dismissed prior to noon, and often suspended for the following day or days. The parents did consult a therapist during this time, and did consult a physician regarding possible ADHD. The physician prescribed medication. Eventually, the parents consented to a psycho-educational evaluation. The IEP team, however, did not find the student eligible for special education. The psycho-educational evaluation recommended an academic setting with a low teacher/student ratio. The charter school continued his placement in a class of 28 children with a teacher and aide. The school,

based on the student's ADHD and medication, did develop a "504 Accommodation Plan" that continued to dismiss him at noon, or earlier if his behavior was aggressive. The student's educational placement was changed often at the end of his kindergarten year, but with little or no coordination or planning. Shortly after the beginning of first grade, the student's parents were notified he would be facing long-term suspension or expulsion. The parents were not notified of Sec. 504 procedures. To avoid expulsion, the parents withdrew the student from the charter school and enrolled him in the local public school, where he completed the first grade with no early dismissals or suspensions. The charter school, in resolving the complaint, agreed to do the following: (1) re-admit the student for second grade, if his parents so request; (2) submit to OCR for approval procedures and policies regarding the use of physical restraints, Sec. 504 plans, pre-referral procedures, and newly enrolled students with disabilities; (3) submit to OCR for approval policies and procedures for mandatory training for school employees on racial and ethnic sensitivity, classroom transfers, and nondiscrimination; and (4) reimburse the parents for the costs associated with therapy, tutoring and childcare they provided the student as a result of the numerous removals from school.

Discrimination Generally

Villanueva v. Carere, 85 F.3d 481 (10th Cir. 1996) involved the Colorado Charter Schools Act. The University of Southern Colorado was granted a charter by a local school district to open an arts and sciences school using non-traditional teaching methods, especially in addressing the needs of "at risk" and minority students. Colorado is also a "school of choice" state, permitting parents to send their children to any school in a public school district. The charter school sought to ensure geographic and ethnic diversity. Students were admitted on a first-come, first-served basis. There was a mandatory community service requirement as well as a mandatory pre-admission parental interview, although, in practice, the interviews occurred after admission. Parents were required to provide transportation. There was a concerted effort to publicize the charter school. In the first year of operation, 52 percent of the students were Hispanic while total enrollment was 62 percent minority. Although the local school district had discussed school closings for several years, it did not vote to close any schools until three months after granting the aforementioned charter. Thereafter, it closed two neighborhood elementary schools that had a population that was 75 percent Hispanic. Parents of Hispanic students filed suit, claiming the opening of the charter school with the closure of neighborhood schools serving primarily an Hispanic population violated equal protection and due process rights. They sought a permanent injunction. The federal district court denied the motion for injunctive relief and dismissed the case. The 10th Circuit Court of Appeals affirmed the dismissal, finding no discriminatory impact on Hispanic students or intentional discrimination based on ethnic origin. The court also rejected the argument that "at risk" students created a suspect classification. This argument was based upon the State law that reserves thirteen charters for schools that address educational needs of "at risk" students. "At risk" pupils are defined as those "who, because of physical, emotional, socioeconomic, or cultural factors, [are] less likely to succeed in a conventional educational environment." At 488. Plaintiffs argued that the word "cultural" is a "code-word for ethnic minority," thereby separating and classifying students according to race and ethnicity. The court

allowed that the use of "culture" is somewhat suspect, but when the law is read in its totality—including the open enrollment and nondiscrimination requirements, as well as parental choice not to send their children to such schools—there is no evidence that any suspect classification has been created. Id.

Establishment Clause Concerns

Porta v. Klagholz, 19 F.Supp. 2d 290 (D. N.J. 1998). In 1995, New Jersey's legislature passed the Charter School Program Act. A "charter school" in New Jersey is defined as "a public school operated under a charter granted by the Commissioner [of Education], which is operated independently of a local board of education and is managed by a board of trustees." At 302. Charter schools may not construct facilities with public funds, but are excused from compliance with school building requirements, except health and safety requirements. Charter schools may not discriminate on the "basis of intellectual or athletic ability," but may limit admission to a particular grade level or to areas of concentration, such as mathematics, science, or the arts. Id. Plaintiff sought to enjoin two charter schools from operating in facilities leased from churches and to enjoin the state from providing funds to such charter schools. The court found for the defendants, noting that the charter schools entered into standard commercial leases with the churches at the fair market rental value. (At trial, only one charter school remained as a defendant.) The classrooms had no visible church signs or religious symbols, artwork, or literature. "The building has a secular appearance," the court found at 299. Further, "the court finds that the school has taken all reasonable and necessary steps to cover or remove vestiges of religion." Id. The court determined the curriculum was non-sectarian and students were not selected based upon church attendance or affiliation. Because there were more potential students than the charter school could accommodate, students were selected by random lottery. At 300. "There is one minor lease restriction pertaining to Halloween decorations by the school, in which the school has agreed not to keep Halloween-type items on display because the church does not want depictions of witches, devils, ghosts, and the like."[13] At 300. As a consequence, "The court rejects plaintiff's assertion that the mere leasing of public school space in a church building, without more, violates the First Amendment's Establishment Clause." At 301. The court also found New Jersey's Charter School Program Act did not, on its face, advance religion.

Degree of State Control

In 1993, Michigan's legislature passed a charter school law (using the term "academy"), but allowing such schools to organize as nonprofit corporations run by a board of directors. An application had to include a list of proposed members of the board of directors, a description of qualifications and method for selecting board members, and proposed articles of incorporation. Four different entities could authorize an "academy": a local governing body of a school district, an intermediate school district's board, the board of a community college, or the board of a public university. The authorizing body is the fiscal agent for the public school academy and is

[13]See "Er the Gobble-Uns'll Git You," **Quarterly Report** July-September 1996.

responsible for compliance with applicable laws and the contract creating it. State law does consider such academies to be "public schools." Churches and other religious organizations were not able to operate academies under this law. The first school to be approved was the Noah Webster Academy, which planned to use telephones and computers to connect up to 2,000 home-schooled students statewide in grades K-12 to 14 teachers located in a schoolhouse. The Noah Webster Academy became the focal point of protracted litigation.[14] In Council of Organizations and Others for Education About Parochiaid v. Governor of Michigan, 566 N.W.2d 208 (Mich. 1997), the Michigan Supreme Court reversed the appellate court on the issue of the constitutionality of the Michigan statute, finding the public school academies did not have to be under the *direct* immediate and exclusive control of the state, given that the state constitutional requirement was that the legislature maintain and support a system of free public elementary and secondary schools. At 216. These charter schools, the court found, are under the "ultimate and immediate control of the state and its agents." This finding is based upon the fact the charter can be revoked at any time by the "authorizing body" where there are reasonable grounds to do so (such as not complying with applicable law); authorizing bodies are public institutions over which the state exercises control; and the state controls the money. At 216-17. The majority opinion also found the charter schools/public school academies were obliged to abide by school code requirements not otherwise specifically exempted by law, although the dissent disagrees. It is the state's direct control of the four authorizing bodies that essentially dictated the finding by the majority that the Michigan law was constitutional.

Geographic Limitations

As noted, *supra*, three of Indiana's four proposed bills on charter schools would limit charter schools to operating within the geographic boundaries of the public school corporation granting the charter. One bill would permit the operation essentially anywhere in the state. There are no reported cases directly on point, but there is an interesting decision involving a suburban Detroit school district, through a third-party contractor, opening an alternative school within the boundaries of an urban school district. The two schools' boundaries are not contiguous. The suburban school intended to count the pupils for state aid, even though the students lived in the urban district. The suburban school claimed its "alternative school" was a "school of choice." The court found the suburban school could not claim the urban school students without the agreement of the urban school. See Detroit Public Schools v. Romulus Comm. Schools, 575 N.W.2d 90 (Mich. App. 1998).

[14]Although only one of Indiana's four bills would allow certain post-secondary schools to operate charter schools, all four would prohibit the use of such schools as either home schools or sectarian schools. Two bills would prohibit the creation of a "virtual school," an apparent reference to the Noah Webster Academy.

State Agency Involvement

All four of the Indiana's proposed charter school bills contemplate, to varying degrees, involvement of State educational agencies, either in an adjudicative function or in data collection, analysis, and reporting.

Booth v. School District No. 1, 950 P.2d 601 (Colo. App. 1997) involved an unsuccessful charter school applicant who sought review by the Colorado State Board of Education (CSBOE). The CSBOE had remanded the denial to the local school district with instructions to reconsider certain disputed issues in the application (site, facilities, costs, and revenues). However, following discussion, the local school district again denied the application. A second appeal was made to the CSBOE, who, after a public hearing, ordered the school district to grant the charter, establishing a middle school. The State Board also ordered the parties to continue to discuss their disagreements and provide a status report to them. However, the written order that followed the public declarations by the CSBOE ordered the school board to "approve the charter" rather than ordering "the establishment" of the charter school. The previous problems remained unresolved, resulting in the present action. Under Colorado law, the CSBOE was to issue a "final" order upon the second appeal. The order for the parties to continue to discuss disputed areas without the CSBOE resolving them exceeded the CSBOE's authority. Also, even though State law indicates the decision of the CSBOE in such matters is to be "final and not subject to review," this would apply only to judicial review of final administrative orders. The court has authority to review the allegations of the local school board that the CSBOE's order is not enforceable because of its lack of finality. The court found the State Board's order unenforceable and directed the CSBOE to reconsider its order and issue a new order.

Shelby School v. Arizona State Board of Education, 962 P.2d 230 (Ariz. App. 1998) involved the adequacy of State Board procedures for receiving and acting upon charter school applications. In this case, the Arizona State Board of Education (ASBOE) denied a charter to the Shelby School, in part because of concerns about the creditworthiness of the applicants and, possibly, the association with a religious group. In Arizona, a "charter school" is a public school that operates under a charter contract between a "sponsor" (school district, the ASBOE, or the State Board for Charter Schools) and a public body, private person, or private organization. The two state-level boards may approve up to twenty-five (25) charter schools each fiscal year. At 234. The applicant school had once been associated with the Church of Immortal Consciousness, but described itself in its application as a non-profit, tax-exempt corporation and non-sectarian school. The ASBOE required applicants to provide criminal history information and to permit reference and credit checks. The applicant complied. The State Board initially approved the application, but made it contingent upon, among other things, a favorable background investigation**.** Residents of the area where the charter school would operate objected to the school, in part because of perceived increases in tax, but also because of the purported lifestyle and religious beliefs of the people associated with the school. Further, a background investigation raised questions of the creditworthiness of key members of the school. The charter was then denied, based on the credit report. The two members of the applicant school whose

credit reports had jeopardized the charter withdrew and were replaced by two other board members, but the ASBOE would not permit the charter school applicant to amend its application. The State Board reaffirmed its denial. In reversing the State Board's actions, the court found its adjudicative processes lacking in fundamental fairness, including the failure to make findings and conclusions and the deliberating behind closed doors without meaningful input from the affected party. The decision to issue a charter in Arizona is not with the court. As a consequence, the court remanded to the ASBOE for further consideration, with the applicant permitted to supplement the record and reargue its position. "The Board may then make its decision, which it must support with adequate findings and conclusions." At 238. However, the court did find the ASBOE was within its discretion to conduct investigations into the creditworthiness of an applicant, as well as the lifestyles and religious affiliations of applicants, because there may be a nexus between these inquiries and the legality and viability of a charter, should it be approved.

SCHOOL BUS DRIVERS AND AGE DISCRIMINATION

The Age Discrimination in Employment Act (ADEA) 29 U.S.C. §621 *et seq.*, prohibits an employer from failing or refusing to hire or for discharging an individual because of the individual's age. 29 U.S.C. §623(a)(1). Independent contractors have been excluded by courts from protection under the ADEA. However, whether one is an "employee" or an "independent contractor" can be complicated by the circumstances of the employment relationship and the fact ADEA's definition of "employee" is somewhat imprecise.[15]

In Indiana, public school districts have four (4) options to choose from when providing transportation:

1. Buy buses and enter into "employment contracts" with drivers employed by the school district. I.C. 20-9.1-2-3;

2. Enter into "transportation contracts" with a person who supplies both the bus and the services. I.C. 20-9.1-2-4;

3. Enter into "fleet contracts" with a person who provides two or more buses and drivers. I.C. 20-9.1-2-4.1; or

4. Enter into "common carrier contracts" with any regular route common carrier operating under the jurisdiction of the Department of Revenue. I.C. 20-9.1-2-25.

Independent Contractors

[15]An "employee" under ADEA is "an individual employed by an employer." §630(f). The Supreme Court has characterized this definition as "completely circular and explains nothing." Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323, 112 S.Ct. 1344 (1992).

The first option establishes an employee-employer relationship, but the other three options would appear not to do so, especially for ADEA purposes. This became the primary issue in Equal Employment Opportunity Commission (EEOC) v. North Knox School Corporation, 154 F.3d 744 (7th Cir. 1998).

North Knox refused to renew the contracts of two bus drivers aged 70 and 72 years. The services of the two drivers had been retained pursuant to the "transportation contract" option. The school seeks bids for each of its routes and awards these to the lowest responsible bidder. North Knox had a policy of permitting an incumbent driver to retain his route even if he were not the lowest bidder so long as he was willing to match the lowest bid. The contracts were for four years, the longest period of time permitted by statute. Although both drivers had entered into multiple transportation contracts with North Knox, the local governing body adopted a policy against contracting with drivers 70 years of age or older. The drivers filed complaints with EEOC, who eventually filed this suit on their behalf. The federal district court found the drivers to be independent contracts and, accordingly, not covered by ADEA. EEOC appealed to the 7th Circuit Court of Appeals, which affirmed the district court's grant of summary judgment to the school district.

The 7th Circuit employed five (5) factors as an "economic realities" test for determining whether one is an independent contractor or an "employee." These factors were:

1. The extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work;

2. The kind of occupation and nature of skill required, including whether skills are obtained in the work place;

3. The responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance operations;

4. Method and form of payment and benefits; and

5. The length of job commitment and expectations.

154 F.3d at 747. The court stated the most important factor is the employer's right to control. EEOC asserted the school exerted considerable control of and supervision over the drivers. The court rejected this, finding that the regulations governing eligible bidders and drivers "reflect only Indiana's significant regulation of the conduct of school bus drivers" and, as such, are "controls" dictated by statute and not by the school district. Id., 748. This includes bus specifications, pupil discipline, termination, physical abilities, moral character, proper licensure, and the alteration of routes. Id., at 748-49.

The court also found the third factor "most persuasive." Because the drivers were required to

supply their own buses and absorb all costs, such as insurance and maintenance, "[t]his is a strong indication that the drivers were independent contractors." Id., at 749. This is bolstered by the fact the drivers provide their own tools and uniforms and have control over their buses when not in use pursuant to the transportation contract.

Under the fourth factor, "method and form of payment and benefits," the court noted the compensation under the transportation contracts was based on a per-mile rate, affected by fluctuations in the price of fuel, as permitted by statute. The compensation is set by the bidding process and does not include other benefits. In addition, North Knox did not treat these drivers as employees for tax purposes and unemployment compensation benefits, and did not issue them W-2s. Rather, North Knox issued the drivers Form1099s, "which would be appropriate for independent contractors." Id., at 750.

In a footnote (note 2, at 751), the court added:

> Even assuming that the drivers here were covered by the ADEA, we question whether the EEOC had a valid claim on the merits. The ADEA provides employers with an affirmative defense "where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of business," 29 U.S.C. §623(f)(1), and North Knox asserted here that its policy against accepting bids from drivers aged 70 or older was just such a BFOQ...

Employees and BFOQ

The U.S. Supreme Court established a two-step process for evaluating whether an age-based qualification is justified by safety concerns:

1. Is the age-based job qualification "reasonably necessary" to the overriding interest in public safety? and

2. Is the employer compelled to rely on age as a proxy for those safety-related job qualifications?

Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 412-17, 105 S.Ct. 2743 (1985).

Although minimum age requirements are established by statute for a school bus driver (must be at least 21 years of age), I.C. 20-9.1-3-1(5)(A), there are not upper limitations. However, I.C. 20-9.1-3-1(a)(7) requires in relevant part of any prospective bus driver:

> A person may not drive a school bus for the transportation of school children...unless the person satisfies the following requirements:
>
> . . .
>
> (7) Possesses the following required physical characteristics:
>
> (A) Sufficient physical ability to be a school bus driver, as determined by the state school bus committee (I.C. 20-9.1-4-1).
>
> (B) Possession and full normal use of both hands, both arms, both feet, both legs, both eyes, and both ears.
>
> . . .
>
> (D) Freedom from any mental, nervous, organic, or functional disease which might impair the person's ability to properly operate a school bus.
>
> (E) Visual acuity, with or without glasses, of at least 20/40 in each eye and a field vision with 150 degree minimum and with depth perception of at least 80%.

P.L. 54-1998, Sec. 5, amending I.C. 20-9.1-4-4, requires the State School Bus Committee to adopt rules "to prescribe performance standards and measurements for determining the physical ability necessary for a person to be a school bus driver." The State School Bus Committee has been working on this criteria. Once completed, the criteria would be useful in establishing the BFOQ for employee school bus drivers for ADEA analysis.

In the interim, there are remarkably few ADEA cases that would be instructive in evaluating ADEA situations involving "employee" school bus drivers.

1. Tullis v. Lear School, Inc. 874 F.2d 1489 (11th Cir. 1989). The private school dismissed Tullis because his age—65 years—would increase the school's insurance rates. The driver brought an action under ADEA. The federal district court found that increased insurance cost is not a factor that would exempt the school from compliance with ADEA. See 29 CFR §1625.10(f). However, the district court did accept the school's BFOQ defense that the age factor was "reasonably necessary to ensure the safe transportation of its students." 874 F.2d at 1490. See also 29 U.S.C. §623(f)(1). The 11th Circuit agreed with the district court that increased insurance cost is not a legitimate factor, but reversed the court on the driver's age constituting a BFOQ. The BFOQ exception to the ADEA

"was intended to be an extremely narrow exception to the statute's general prohibition of age discrimination in employment." At 1491. In applying the Supreme Court's two-part analysis as established in Western Air Lines, *supra*, the circuit did not find the BFOQ was reasonably necessary to operating a school, and it was not shown that, generally, anyone his age would be unable to perform these duties safely and efficiently, or that it was "impossible or highly impractical to deal with older employees on an individualized basis." Id.

The district court found that "as one grows older, physical examinations lose their predictive value," adding that such tests "are too imprecise to determine subtle deficiencies which might ultimately jeopardize the lives of children and motorists." Id. However, "[t]he only evidence on record in *this* case," the circuit court wrote, "is to the contrary." A gerontologist provided her expert opinion that "tests are available which can determine whether individual drivers are capable of performing their jobs safely. This testimony was uncontradicted." Accordingly, the circuit court found the school did not show that the driver's age was a BFOQ for the position of school bus driver. The evidence suggested his termination "was based on his attaining the age of sixty-five." Id.

2. Kindred v. Northome/Indus Sch. Dist. No. 363, 983 F.Supp. 835 (D. Minn. 1997). Bus driver alleged sex and age discrimination based upon perceived adverse employment action when she was assigned a longer bus route but without "premium pay." The school district has only 400 pupils but these are spread out over 1800 square miles. As a consequence, transportation costs per pupil are high. The governing body sought ways to cut costs. The collective bargaining agreement required additional compensation ("premium pay") for bus routes that were lengthy. When the driver on one such route resigned, the school district rearranged routes to eliminate the need to replace the driver who resigned. Plaintiff's reconfigured route contained parts of the route that previously generated "premium pay." The subsequent collective bargaining agreement eliminated references to "premium pay." Plaintiff requested additional compensation, but was refused. Other bus drivers—including one of the same gender and older than plaintiff—requested and received additional compensation due to the length and travel time of their respective routes. The court granted summary judgment for the school.

The court recognized that one need not be terminated as a precondition to suit under ADEA but must experience an "actionable change in employment status," such as demotion, loss of wages or salary, material loss of benefits, significant reduction in responsibilities, or being accorded a less distinguished title. At 842. However, changes in duties or working conditions that cause no materially significant disadvantage are insufficient to establish the adverse conduct necessary to support such an action. Id. the plaintiff in this case retained the same title, salary, and benefits. The reconfigured route involved no change in her duties or responsibilities. Id. In addition, the school's reasons for altering the routes were legitimate and nondiscriminatory (budget concerns), and plaintiff failed to show the proffered reasons were mere pretextual for intentional discrimination.

COURT JESTERS: THIS LITTLE PIGGY GOES TO COURT

It is a common experience for parents to wiggle the toes of their infants one by one while reciting "This Little Piggy Goes to Market" all the way through to the Little Piggy who had bladder control problems. With this fifth piggy, the fifth toe is wiggled in an exaggerated fashion and the child giggles in wild appreciation. Of course, this is not as amusing when federal judges are pulling legs rather than wiggling toes. But such was the case in Texas Pig Stands, Inc. v. Hard Rock Café International, Inc., 951 F.2d 684 (5th Cir. 1992), a trademark infringement action involving the registered mark "pig sandwich," an apparently delectable portion of barbecued porcine meat on wheat or white bun. The judges on the federal circuit bench decided to have a little fun with this dispute, with all the headnotes styled according to the childhood nursery rhyme. According to the court, the "pig sandwich" has a "long and illustrious career" and has "its origins in the hills of western Tennessee" where it has "endeared itself to the hearts and stomachs of the citizenry there since the turn of the century."[16] The court then described the procedural history of the dispute, first by describing the commercialization of the "pig sandwich" under the headnote "This Little Piggy Went to Market." Texas Pig Stands (TPS) "was in veritable hog-heaven" until Hard Rock appeared on the scene with its own "pig sandwich." TPS demanded Hard Rock cease this activity, but Hard Rock "chose to stay in its house and let TPS try to blow it down. Whether Hard Rock's legal edifice is made of brick, twigs, or straw remains to be seen." The legal merits were then discussed under the headnote "This Little Piggy Went to See His Lawyer." The court expressed caution, declining to "rush higgledy-piggledy into the questions which arise out of the trial court's damages hearing." Other headnotes include "Collateral Estoppel—Does the Pork Stop Here?"; "A Pig is a Pig is a Pig—Or is it?" (where Hard Rock charged "full-*boar*" into the issue as to whether "pig sandwich" is too generic to be protectable"); "Fraud in the Registration—Did a Greased Pig Slip Past the PTO?"; "Unjust Enrichment—Did Hard Rock Bring Home the Bacon?"; "Palming Off—A Pork Purveyor Has His Pride"; and "Award of Attorney Fees—Did the Trial Court Go Hog Wild?"

Throughout the decision, there are numerous humorous remarks, such as referring to the dispute as "the swine showdown... in Dallas" where "swining and dining" are "linked" to the presence of

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[16]Actually, there is an earlier account which significantly predates the Tennessee discovery of the "pig sandwich." Charles Lamb, in "A Dissertation Upon Roast Pig," Essays of Elia (1823), reported that roast pig was discovered by accident in ancient China when the house of a swineherd burnt to the ground, roasting nine pigs who were inside. When the swineherd and his son attempted to move the smouldering carcasses, they burned their fingers, which they immediately put in their mouths. Once they tasted how good roast pig was, their neighbors observed the swineherd's house to burn down more frequently than previously. When the heinous crime of eating roast pig was discovered, the swineherd was brought to trial. But when the judge handled the evidence, he burned his fingers and, of course, put them in his mouth. An acquittal followed. Roast pig became a delicacy in the area, and many houses were being burnt to the ground with pigs in them until a sage advised the populace that pigs could be roasted or broiled without the loss of one's domicile.

the “pig sandwich.” A former Texas case continued to “raise its ugly snout.” Nevertheless, in the end, Hard Rock’s actions were found to be “not entirely kosher” but “not sufficiently swinish” to support an award of attorney fees to TPS. TPS, the court noted, “now leaves this legal barnyard with its mark intact.” And how did the court announce its decision and orders (at 698)?

D-D-Dt D-D-Dt That’s All, Folks!

QUOTABLE . . .

There is an unedifying moral to be drawn from this case of *The Man in High Office Who Defied the Nation:* The mills of the law grind slowly—but not inexorably. If they grind slowly enough, they may even come, unaccountably, to a gradual stop, short of the trial and judgment an ordinary citizen expects when accused of criminal contempt. There is just one compensating thought: Hubris is grist for other mills, which grind exceeding small and sure.

Circuit Judge John Minor Wisdom, dissenting opinion, United States v. Barnett, 346 F.2d 99, 109 (5th Cir. 1965). Ross R. Barnett was the governor of Mississippi in 1962 when James Meredith attempted to enroll in the then all-white University of Mississippi. Barnett was found in civil and criminal contempt of the 5th Circuit Court of Appeals for his subsequent actions in defying the court’s orders to admit Meredith to the school. The majority dismissed the criminal contempt proceedings and upheld the civil contempt, but levied no further sanctions. This decision was based in no small part on Gallup poll results showing an ease in racial tension and a public desire not to reopen wounds. Judge Wisdom, as did two other dissenting judges, believed that Barnett should have been brought to trial for his contemptuous behavior, which resulted in injury, loss of life, and loss of property during subsequent rioting.

UPDATES

Exit Examinations

There continue to be a number of challenges to various "high stakes" statewide examinations designed to assess minimum proficiencies or competencies. (Please refer to the index for previous articles in **QR**.) The usual challenge is that the state's high school examination is discriminatory against individuals with disabilities because accommodations were not permitted. In recent years, such challenges have not succeeded. The latest reported investigation by the Office for Civil Rights (OCR) in Alabama Department of Education, 29 IDELR 249 (OCR 1998) involved the Alabama High School Graduation Exam (AHSGE). The student allegedly was not permitted to use his Arkenstone scanner, a reading device, on the reading portion of the AHSGE. OCR noted that Sec. 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act, while prohibiting discrimination on the basis of disability, do not require that aids, benefits, and services, to be equally effective, "produce the identical result or level of achievement for disabled and nondisabled persons, but must afford disabled person an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the person's needs." In this situation, the student had a specific learning disability, dyslexia. His Individualized Education Program (IEP) contained accommodations in all academic areas as well as testing. Testing accommodations included having written tests read aloud. "Although not listed on his IEP, the student uses an Arkenstone scanner in his educational program. This is a device which scans and reads text to an individual."

The student was considered capable of earning a high school diploma. Alabama requires any student receiving a diploma from a public high school to pass all three subtests (Reading, Mathematics, and Language) of the AHSGE. The Alabama exit examination is a minimum skills test measuring competencies ranging from the seventh to the ninth grades. Alabama allows the use of accommodations on the AHSGE. "Specific modifications are categorized as format and/or equipment, recording, and test setting modifications. The purpose of these modifications is to allow a student with a disability to demonstrate his/her degree of achievement, and to ensure that each student with a disability receives individual consideration of their [sic] disability. The allowable test modifications are designed to consider a students [sic] disability without changing the nature, content, or integrity of the test." Although the Arkenstone scanner is permitted for use on the Math and Language subtests, it is not permitted on the Reading subtest. "The basis for the exclusion of the scanner on the Reading subtest of the Exit Exam is because the Reading subtest assesses whether a student can read well enough to comprehend everyday material. [R]eading modification, if allowed, would not show the Student's ability to read and comprehend, only the Student's listening skills."

Although OCR found the Student was not allowed the use of his scanner on the Reading subtest, the federal agency also noted the use of "the scanner would supplant the skill of reading, which is the skill that the Exit Exam is designed to measure." OCR also noted the student was permitted

other accommodations, including taking the test in the special education classroom, it was provided in large print, Math and Language subtests were read aloud to him, and he was allowed to mark answers in the test booklet. When considered in its totality, the Student did not experience discrimination.

Contracting for Educational Services

In **QR** April-June: 1997, the Elkhart Circuit Court's opinion in Fireoved v. Ombudsman Educational Services, Ltd., and the Elkhart County Education Interlocal was reported. Ombudsman, a for-profit corporation, was hired to operate an alternative school. Although there is no statute that permits a public school corporation to contract in this fashion, there is no statute that proscribes such a relationship, the court found. Plaintiffs appealed to the Indiana Court of Appeals. In a not-for-publication memorandum opinion dated October 6, 1998, the Court of Appeals found that the plaintiffs (teachers belonging to the local collective bargaining unit) did not have standing to initiate this action, and the trial court should have dismissed the action rather than render judgment. Relying in part upon FWEA v. Indiana Department of Education, 692 N.E.2d 902 (Ind. App. 1994), reported in **QR** Jan.-Mar.: 1998, the appellate court observed that courts should "act in real cases, and refrain when called to engage in abstract speculation." Slip Op. at 4. The court believed to be too speculative the teachers' claim that the contract would result in a reduction in the number of teachers due to a corresponding reduction in the number of pupils served directly by the school district. Id. The court also noted that the students assigned to the alternative school are students who typically would not thrive in the traditional public school setting anyhow. "Thus, the 'fewer students-fewer teachers-teacher terminations' result, should it come into existence, will find its genesis in student disenchantment, not in student flight to alternative programs provided by private corporations." Slip Op. at 5. The appellate court, relying upon FWEA, also rejected the teachers' argument they had "public standing" to enforce public rights rather than assert private ones. A "direct injury" is also a necessary prerequisite to invoke "public standing." The matter was remanded to the trial court to vacate its judgment and enter an order of dismissal. Id., at 6.

School Prayer and Graduation Ceremonies

Although judicial constructions are fairly consistent since Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649 (1992) that officially sanctioned prayers and invocations at public school graduation ceremonies violate the Establishment Clause of the First Amendment, the courts continue to struggle with student-initiated prayer at such ceremonies. See **QR** April-June: 1997. The latest case is Doe v. Madison School Dist. No. 321, 147 F.3d 832 (9th Cir. 1998), upholding the district court's grant of summary judgment to the school district. Doe challenged the Idaho school district's policy that permitted student speakers selected to speak at the graduation ceremony to deliver "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement." The students were selected based on their academic standings and decided individually the content of their respective pronouncements. There is no interference by school officials. The 9th Circuit disagreed with Doe's assertion the school's policy violated the First

Amendment by permitting students to interject prayers and religious songs into the graduation ceremony. The court noted the Lee decision "did not purport to erect a per se rule against religious activity in public school graduation ceremonies." At 834. The court distinguished between what is officially sanctioned and what is permitted. "Indeed, it is the absence of this control which saves the graduation policy at issue from facial constitutional invalidation." At 835. The Idaho school's policy differed from the one invalidated in Lee: (1) students, not clergy, delivered the presentations; (2) student-speakers were selected by purely neutral and secular criterion (academics); (3) students had autonomy over content; and (4) the school did not require a prayer. Id.

Prayer and Public Meetings

Courts continue to express less concern for prayer and other invocations at public meetings. See **QR** Jan.-Mar.: 1997 and **QR** Jan.-Mar.: 1998. In the latest such case, a federal district court declined to enjoin a school board's practice of beginning its meetings with an invocation by someone selected by the board president. Bacus v. Palo Verde Unified Sch. Dist., 11 F.Supp.2d 1192 (C.D. Cal. 1998). This court, as did the court in Coles v. Cleveland Bd. of Ed., 950 F.Supp. 1337 (N.D. Ohio 1996), found the school board meetings were more meetings of a public deliberative body than a school-related function. Although children may be present on occasion, board members and other attendees were mostly adults and not susceptible to religious indoctrination or coercion.

The mention of "Jesus" or "Jesus Christ" was deemed insufficient to show the invocations were sectarian or were used as a vehicle to proselytize or advance the Christian religion or to disparage other faiths. At 1197-98.

Distribution of Bibles

QR April-June: 1998 reported on the federal district court's decision upholding a West Virginia public school district's relatively neutral means of permitting Bible distributions in their schools on a limited basis by non-students. The 4th Circuit Court of Appeals substantially upheld the district court. In Peck v. Upshur Co. Board of Education, 155 F.3d 274 (4th Cir. 1998), the school district had instituted a policy forbidding the distribution of religious and political literature in its schools. However, in discussions with community groups, it ameliorated its position, permitting religious material to be placed on a predetermined table where students could pick up information if they so desired. School officials were not involved in setting up the tables, nor were they responsible in any custodial manner for the material. Bibles not picked up by students during the day were to be removed by the end of the day by the groups responsible for the display. The tables were placed in common areas that were accessible to students and where they would normally congregate. This would lessen the perception they were being watched or pressured into taking a Bible. No one stood at the tables to encourage student participation, nor was the source of the material identified. The school did not announce the availability or in any way promote the availability of the material, but a sign at each table did

invite students to take any material they wished. The circuit court, however, did not believe greater precautions needed to be employed in the elementary schools, contrary to the district court's holding.

There is not a violation of the Establishment Clause when a public entity permits private entities to offer passively the Bible or other religious material to secondary school students pursuant to a policy of allowing private religious and nonreligious speech in public schools. At 288.

> "In the end, this case is not about the Bible, but about the principled application of established Supreme Court precedents which hold that the state may no more discriminate against, than it can establish, religion when it opens its facilities to private speech."

Id. The court noted "the unrivaled symbolic power of the Bible," but such power is "irrelevant to the constitutional analysis... The Bible is no less deserving of the constitution's protection than any other text of faith." Id. Once the school opened its facilities to other private speech (e.g., Little League, Boy and Girl Scouts, 4-H, Women's Christian Temperance Union), it could not discriminate against religious speech. Id.

Court Jesters: The Spirit of the Law

QR July-Sept: 97 reported the case of Stambousky v. Ackley, 572 N.Y.S.2d 672 (A.D. 1 Dept. 1991), where the New York Appeals Court found that a house was "haunted" as a matter of law, the seller knew it was haunted, and the buyer did not receive the house in the vacant condition contemplated. Because of these findings, the court permitted the buyer to rescind the contract and retrieve his down payment.

Although the case is amusing to all but the seller and the buyer, Indiana readers should not be so smug. Since 1993, there have been laws on the Indiana books to prevent the misrepresentation of certain "psychologically affected property" when selling, renting, or leasing it. "Psychologically affected property" is, essentially, "haunted." "Psychologically affected property" is defined at I.C. 24-4.6-2.1-2 to include (among other things) real estate or a dwelling where someone died on the property, a felony was committed there, or an occupant "was afflicted or died from a disease related to the human immunodeficiency virus (HIV)." An owner of such property (or his agent) is not required to disclose the haunted condition of the property, but he cannot

intentionally misrepresent a fact concerning a psychologically affected property in response to a direct inquiry from a transferee." I.C. 24-4.6-2.1-5. There are no reported cases interpreting Indiana's "Haunted House" statutes, so apparently buyers are not being spooked by this.

Date

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INDEX FOR QUARTERLY REPORT
THROUGH OCTOBER - DECEMBER 1998

Legend

J-M (January-March)
A-J (April-June)
J-S (July-September)
O-D (October-December)